

WRITTEN TESTIMONY IN SUPPORT OF HB 370

My name is Ronald F. Waterman. I am an attorney who has been practicing for 44 years and a portion of my practice has been involved with the correctional system. I present this written testimony in support of HB 370.

I wish to address two aspects of the bill before you, the economic costs of a death penalty case and the potential of convicting and executing an innocent person. Before doing so, however, I believe that this committee should understand what the long history of capital punishment in the United States has established and why all western nations aside from the United States have banned this form of punishment as being inconsistent with humane treatment of life and dignity.

In America, the death penalty has been disproportionately applied in a random and capricious manner, with virtually no predictability. The exercise of the death penalty is filled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe a sentence. To date, over 200 individuals have been freed due to the use of DNA testing and findings that those individuals had not actually committed the crimes of which they were convicted. Of these individuals, a substantial number were under a death sentence. Several years ago, two individuals in Mississippi had been convicted by perjured and false testimony provided by two state experts who testified about teeth marks on the victim which did not actually exist. Error is prevalent in all states which have a death penalty. It is estimated that 75% of all death penalty cases experience some flaw, either in the guilt phase or in the penalty phase of the proceedings. An examination of the death penalty in Montana reveals that the death sentence has been improperly imposed at least 68% of the time in this state. On at least four occasions, courts have set aside the death sentence directing that the inmate be resentenced to a lesser sentence. Other death sentences have been set aside due to errors committed in the sentencing process.

One point is important to underscore. The death sentence does not deter crime or other capital crimes. No valid research exists which supports the conclusion that a death sentence has any deterrent effect. There are several reasons for this, including that individuals who commit capital crimes do not engage in any analysis of what penalty their conduct might trigger and as noted above, since most people believe that the death penalty is flawed, this dispels any deterrent effect of the death sentence.

Additionally, the death penalty is simply too random in its application to deter crime. It is too easy for an individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. From my work at the Montana State Prison, I know that on both the high side and the low side, individuals are in the prison population who have committed crimes similar to the crimes which have resulted in the two death penalty cases; but who did not receive the death penalty. There have always been individuals in prison serving a non-capital sentence whose crimes were identical to those individuals who committed crimes which had resulted in a death sentence.

In looking at how we decide to exercise the death penalty, some unfortunate statistics arise which underscore the basic unfairness of the death penalty. Those who are sentenced to death are typically strangers to the community where the crime occurs. The individuals who are sentenced to death are typically poor, virtually all have been represented by appointed counsel, typically under-experienced, underpaid and without adequate resources for investigation and expert testimony including penalty phase representation. While Montana now has a new and more effective public defender system, it has been under funded and is struggling to receive the financing necessary to effectively carry out its state wide responsibilities. However, both of the current death sentence inmates were convicted under the old system and all were represented by appointed counsel. One of those under a death sentence had an attorney who spent a total of 10 hours in his representation of the Defendant from the initial interview, plea to sentencing.

Most of the individuals under a death sentence have been subjected to early childhood abuse, often sexual abuse. Typically those under a death penalty sentence have experienced some type of significant head trauma or have a diminished mental capacity below normal. Usually those sentenced to death have been the focus of some law enforcement official who pushed to make the case a capital offense. Finally those under a death sentence are disproportionately a member of a racial minority. At one time in Montana we had one Afro-American out of four capital defendants when Afro-Americans represented less than 1% of Montana's population. For a time, Montana had 2 out of 8 death sentence defendants who were Native Americans when the Native American population was 5% of the total population. This latter statistic is true all across America. The death penalty is disproportionately applied against racial minorities. Eighty percent of all death sentences are carried out in former Confederate States. This racial impact has caused the ABA to call for an actual moratorium of the death sentence and for its abolition.

These statistics are disturbing and support the conclusion that in America and in Montana society executes the poor, the slow, the strangers and the racial minorities of our communities. These disturbing statistics alone amply support the abolition of the death penalty.

I do want to address two specific points. One is cost. As the law now exists, a decision to prosecute a case as a capital crime more than doubles the expense of the prosecution. A capital defendant is entitled to at least two attorneys, who have to be death penalty qualified, that is, they have to have had experience in defending another death case. In Montana, this means that there are only a few attorneys who are even capable of being appointed to represent a criminal defendant and it is possible that in the future, it may be necessary to import a qualified attorney from another state if there was an increase in the number of capital punishment prosecutions. Additionally, the defense in a capital case is entitled to retain investigators and experts, both for the guilty phase of the case and also for the penalty phase of the case. Three of the most recent capital cases, none of which resulted in a capital sentence, all cost in excess of \$400,000 to defend. The capital case filed in Flathead County was budgeted for \$1 million and the two homicide cases in Sidney will significantly exceed that sum. Additionally, once a death sentence is adjudicated, the costs simply continue and most evaluations indicate that a capital case will cost, on average an additional \$150,000 a year from sentence to execution. Since, in Montana, there is typically about a 20 year delay between sentence and execution, the math is rather simple to carry out and to understand the additional expense of a death sentence. I would

urge that this is a poor use of public funds and that these funds could be better spent on early childhood programs to identify, treat and divert individuals before they enter the criminal justice system.

The death penalty protocol has been under constitutional challenge for the past five years and an injunction has been in place since late 2009. The State has just published its third protocol since the litigation commenced and the issues questioning the constitutionality of the protocol continue and may take years and the significant expenditure of funds to resolve. Until resolved, the injunction issued will prevent any execution from occurring.

This high initial cost also mitigates against using the death sentence as a prosecutorial tool for plea bargaining. A decision to prosecute a case as a capital offense must be made early, within 60 days of the indictment. Once triggered, the defendant is entitled to massive exposure to defend against such charges. No prosecutor will spend over \$100,000.00 just to try having a tool to use in a plea bargaining.

The other concern, and one which Montana is not immune from, is the potential of executing an innocent individual. We too often believe that DNA evidence will assure that no innocent person will ever be convicted of a capital offense. However, DNA evidence is not typically available and the time needed for DNA evidence to apply frequently work against DNA evidence as a safety net against a wrongful execution. Generally it takes about 8 years from sentence to execution; it usually takes about 11 years from conviction to reversal of a wrongful conviction. Therefore it takes longer for an individual to be exonerated than to be executed, which clearly means that DNA evidence alone will never be a certain protection against the execution of an innocent person.

Further, too often those who are convicted wrongfully are not convicted due to the mistake of any crime lab but such convictions are the result of intentional misconduct. I mentioned earlier the false testimony in Mississippi which resulted in the conviction of two individuals based solely on the false and fabricated evidence by two state employees. This same conduct is also seen in other states. In Montana, we have seen wrongful convictions set aside due to false and fabricated hair evidence; three individuals wrongfully convicted have been freed and there remains close to 230 other cases which have never been fully examined to ascertain whether there remain others who were also wrongfully convicted by false testimony. As we have too often seen in America, it is not the careless mistake of an individual which results in an invalid conviction, but the intentional misconduct which often places an innocent individual into prison and intentional misconduct is more difficult to guard against than the simple mistakes of crime lab employees.

I would submit that it is time to abolish the death penalty in Montana and urge that all of the foregoing reasons fully support this committee's vote in favor of HB 370. Thank you.